INDEX.

Pages:

PETITION FOR CERTIORARI: 6-15

Summary of the facts 10-13

Summary of the Law 13-14

Exhibit 15-19

BRIEF:

Effect of Interstate Commerce Act and Transportation Act of 1920 20-30

Control assumed under Act of Congress 30-35

Contract rights to be protected 35-37

Right of delivering line to collect freight 38-39

Scope and effect of Texas Garnishment Statute 39-43

Theory of Pennoyer v. Neff 44-46

Solvent foreign corporation not subject to process of foreign attachment 52

The intent of the present proceeding 48-49

Classification under Article 247a Texas Statute 55-58

AUTHORITIES:

Adams Ex. Co. v. Croninger, 22 U. S. 506 30

A. T. & S. F. Ry. Co. v. Weeks, 254 Fed. 513 43

Chambers v. B. & O. Ry., 207 U. S. 142 57

C. R. I. & P. Ry. v. Sturm, 174 U. S. 715 40

Cole v. Cunningham, 133 U. S. 107 56

Davis v. C. C. C. & St. L. Ry. 217 U. S. 157 31

Eggen v. C. N. Ry. 255 Fed. 937 58

Erie Ry. v. New York, 233 U. S. 687 29

Gro. Co. v. T. & P. Ry. 95 Tex. 486 40

Hochstadler v. Sam, 73 Tex. 315 40

Jameson v. Searbrough, 56 Tex. 358 39

Kelly v. Gibbs, 84 Tex. 147 42

Koontz v. B. & O. Ry., 107 N. E. R. 973 35

INDEX (Continued)

	Page
L. & N. Ry. v. Hughes, 231 Fed. 739	30
McDermott v. Wisconsin, 228 U. S. 132	30
Minnesota v. Barber, 136 U. S. 314	37
Mo. Pac. Ry. vs. Clar. Boat Co., 42 S. C. R. 211	47
Mo. Pac. Ry. vs. Washington, 222 U. S. 370	29
Mo. Pac. Ry. vs. Whipsker, 77 Tex. 16	46
Mondou v. Ry. Co. 223 U. S. 55	30
Paul vs. Virginia, 8 Wall. 168	56
Pennoyer v. Neff, 95 U. S. 714	44
St. L. S. W. Ry. vs. Arkansas, 217 U. S. 136	34
So. Ry. v. Ry. Com. 236 U. S. 447	29
Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3	42
Tex. Stat. Art. 247a	18
Trans. Act of 1920, 41 Stat. L. 476	22

IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner,*

vs.

EDMUND R. WELLS, et als. *Respondents.*

No.....

Please take notice that on or about the 1st day of March, A. D. 1923, The Atchison, Topeka & Santa Fe Railway Company, as Petitioner, will file with the Clerk of the Supreme Court of the United States a certified copy of the transcript of record herein, and the requisite number of printed copies thereof, together with its petition for Writ of Certiorari, a copy of which with the Brief in support thereof is hereto attached, and Petitioner will move the motion hereto annexed before the Supreme Court of the United States at the Capitol, in the City of Washington, District of Columbia, on Monday, the 19th day of March A. D. 1923, at the opening of the Court on that date, or as soon thereafter as counsel can be heard, and that it will then and there move for such further relief in the premises as may be just.

Dated at El Paso, Texas, on this the 19th day of February, A. D., 1923.

Alex. Britton,
J. W. Terry,
A. H. Culwell,
Attorneys for Petitioner.

TO J. G.McGRADY and GEO. E. WALLACE.
Attorneys for Respondents,

EDMUND R. WELLS.
GEO. E. WALLACE
A. J. HARPER
C. B. HUDSPETH
TOM LEA
J. G. McGRADY
R. E. THOMASON
E. T. EDWARDS

ACKNOWLEDGEMENT OF SERVICE

Due service and receipt of three (3) copies of the foregoing notice of motion, and attached copy of motion and application for Writ of Certiorari, and brief in support thereof, is hereby admitted, this the 19th day of February, A. D. 1923.

Geo. E. Wallace.
J. G. McGrady,
Attorneys for Respondents.
Edmund R. Wells.
Geo. E. Wallace,
A. J. Harper,
C. B. Hudspeth.
J. G. McGrady,
Tom Lea.
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E. T. Edwards.

IN THE

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OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *Petitioner*
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Respondents.

No.....

MOTION

Comes Now, The Atchison, Topeka & Santa Fe Railway Company by Alex. Britton, J. W. Terry and A. H. Culwell, its attorneys and counsel, and moves the Court upon a certified copy of the record herein, and upon the annexed petition for Writ of Certiorari directed to the United States Circuit Court of Appeals, Fifth Judicial Circuit, sitting at New Orleans, Louisiana, to bring before this Honorable Court the case of The Atchison, Topeka & Santa Fe Railway Company, Appellant, vs. Edmund R. Wells, et als, Appellees, recently decided by the United States Circuit Court of Appeals, Fifth Judicial Circuit, for such proceedings therein as this Honorable Court may deem just, and for such other and further relief in the premises as may be just.

Alex Britton,
J. W. Terry,
A. H. Culwell,
Attorneys for Appellant and Petitioner.

Gardiner Lathrop,
of Counsel.

IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *Petitioner,*
vs.
EDMUND R. WELLS, et als, *Respondents.*

No.....

PETITION FOR CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Atchison, Topeka & Santa Fe Railway Company, respectfully petitions the Court to grant it a Writ of Certiorari to the Honorable United States Circuit Court of Appeals, Fifth Judicial Circuit, sitting at New Orleans, Louisiana, to review the decree of said Court, affirming the decree in favor of Respondents entered in the District Court of the United States for the Western District of Texas, El Paso Division, sitting at El Paso, in the suit of The Atchison, Topeka & Santa Fe Railway Company vs. Edmund R. Wells, et als, and to remove the record in said cause to this Court for the purpose of such review, a copy of said record being presented herewith. The decree herein complained of having been entered in said the United States Circuit Court of Appeals, Fifth Judicial Circuit, on the 15th day of December, A. D. 1922.

Your petitioner respectfully represents that important Federal questions and Federal rights in favor of it, dependent upon the correct construction and proper application of the provisions of the Act of Congress known as the Interstate Commerce Act of 1906, as amended. the Transportation Act of 1920, as well as the Fourteenth Amendment to the Constitution of the United States. are involved, particularly as to the rights of a State Court to subject Petitioner, a foreign corporation. and its property to the jurisdiction thereof, and the correct determination of these questions is of great importance to the public and necessary to an orderly and uniform interpretation of said Acts of Congress. That Petitioner has been denied rights, title, privileges and immunities secured to it under the Fourteenth Amendment to the Constitution of the United States, and liabilities have been imposed upon it contrary to the provisions of the Interstate Commerce Act of 1906. as amended. and the Transportation Act of 1920. the liabilities so imposed being a burden upon Interstate Commerce violative of the provisions of said Acts of Congress and by reason of the erroneous rulings of the said United States Circuit Court of Appeals, Fifth Judicial Circuit, a relief has been denied to it to which it was entitled, the said rulings of the said United States Circuit Court of Appeals. Fifth Judicial Circuit. among others, being as follows:

I.

The United States Circuit Court of Appeals, Fifth Judicial Circuit, held that a foreign railroad company, having no line of railway within the State of Texas, no Agent therein, conducting no business therein, could be subjected to the jurisdiction of a State Court thereof, in an action for damages for personal injuries on a cause of action occurring without the State, by a plaintiff who re-

sides without the State, said jurisdiction alleged to arise from the impounding, under garnishment, of railroad rolling stock belonging to said Company, and found lawfully in the possession of a connecting carrier located within the local jurisdiction, as well as funds belonging to said foreign railway company arising from the conduct of its interstate transportation business, conducted wholly without said State, both rolling stock and funds so impounded used in the conduct of said business as required by law.

II.

Said Circuit Court of Appeals held that under facts as above appearing, plaintiff in said cause could, by garnishment, so impound property belonging to a foreign railroad company and used in the conduct of its interstate transportation business wholly without the State of Texas, as to warrant a judgment in rem against it, even though said railway company was solvent and had property subject to execution in the State where the accident occurred, as well as in each of the other States in which it does business of many thousand times greater value than any sum that might be found due to the plaintiff on the cause of action asserted.

III.

The Circuit Court of Appeals held, in effect, that a Statute of Texas authorizing attachment on unliquidated demands, applicable only against non-residents, warrants process of garnishment, and that the impounding thereunder of funds and rolling stock of a foreign railroad corporation in an action for personal injuries in behalf of a non-resident occurring in another State (said funds arising from business conducted wholly beyond the limits of said State and rolling stock used exclusively in interstate com-

merce) was valid, and as against which said railway company could not invoke either the Fourteenth Amendment to the Constitution of the United States, Section Two, Article Four of said Constitution, or the Interstate Commerce Act as amended, or the Transportation Act of 1920.

IV.

The Circuit Court of Appeals held that impounding funds due to a foreign solvent railway company as balances for transportation charges arising from business conducted wholly beyond the limits of the State on unliquidated demand in favor of a non-resident did not interfere with Interstate Commerce as regulated by the Interstate Commerce Act and Transportation Act of 1920.

V.

The Circuit Court of Appeals held, in effect, that the process of foreign attachment could be constitutionally used for the sole purpose of acquiring jurisdiction over a non-resident in behalf of a non-resident, on an unliquidated demand arising outside the State, it appearing definitely that the defendant had ample assets, subject to any process, at the place where the cause of action arose, as well as in the State where the plaintiff resided, and in each of the States where it does business. The contention of defendant, in these circumstances, that the use of such process was the taking of its property without due process of law and was a denial to it of the equal protection of the law, was overruled.

VI.

Petitioner contended that to construe the Statutes of Texas as authorizing the seizure by attachment of cars and engines belonging to it, while lawfully and under contract in the possession of a connecting line, or as authorizing the

seizure by garnishment of monies due or to become due to it by a connecting line for freight and passenger charges for account of Petitioner, same having been collected by Garnishee as the delivering transportation line, would interfere with, impede and obstruct Petitioner in the performance of the duties imposed upon it by the Act to regulate commerce, and would interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and that said Statutes of Texas, so construed, would deprive Petitioner of its properties and rights without due process of law, because it would not be due process of law when requiring Petitioner by the Act to regulate commerce to permit its cars and engines to run into Texas and to permit the Garnishee to collect its freights and passenger charges to further require Petitioner to submit to the jurisdiction of the Courts of Texas on causes of action by citizens of other States, originating in such other States, and having no relation to any traffic or transportation to or from a point in Texas, or to any business or thing therein. Each and all of these contentions were, by the Circuit Court of Appeals, overruled.

SUMMARY OF THE FACTS

The cause was submitted on an agreed Statement of Facts, from which it appears that Wells filed suit in the State Court at El Paso, Texas, October 7th, 1921, against Railway Company for damages for personal injuries sustained on the 25th day of March, 1921. Notice was served on an officer of Railway Company at Topeka, Kansas, and service made by publication in newspaper in the manner provided by the Texas Statutes; writ of attachment was issued in the method prescribed by the Texas Statutes,

particularly Article 247-A, which writ was returned by the sheriff of El Paso County with the statement that no property of the defendant was found in the county. Thereupon one of the attorneys for plaintiff made an affidavit for garnishment which was served on the Rio Grande, El Paso and Santa Fe Railway Company, which company as garnishee filed an answer which is of record at pages 46-58; at all times Railway Company was a corporation of the State of Kansas, having no line of railroad and no agents and not doing business in the State of Texas. Wells' cause of action arose in the State of New Mexico where he was then employed by Railway Company, at which time Wells was a resident of the State of Colorado; that in said states at all times involved there were courts having jurisdiction of Wells' cause of action in each of which states Railway Company had property subject to execution of a value many thousand times greater than any liability that might be found in favor of Wells; that Railway Company made no appearance in the State Court, wherein a judgment by default was entered against Railway Company on December 21, 1921, for $4.000.00. That the attorneys for Wells who are respondents herein have been assigned an interest in such judgment; that on January 24, 1922, Judgment was entered for Wells against the garnishee and the principal judgment against Railway Company undertook to limit the effect thereof to funds and property of Railway Company held by the garnishee; that to have defended this suit at El Paso, Railway Company would have been required to bring its witnesses from the State of New Mexico, a distance of 150 miles, at a large expense and to be deprived of their services during the time required; that under the statutes of Texas no appearance could have been made in the State court for the purpose of contesting the jurisdiction without thereby submitting to jurisdiction on the merits;

that the moneys impounded and held by garnishee are a balance due Railway Company as its proportion of the transportation charges from interstate traffic conducted by it wholly without the State of Texas which but for being so impounded would have been used by Railway Company in the conduct of its business as a common carrier in interstate and intrastate traffic in the states in which it operates. That the engines and cars of Railway Company in possession of garnishee were delivered by Railway Company to garnishee as a connecting carrier of interstate freights and would have been returned to Railway Company in due course of business and were all needed when returned in the conduct of its business as an interstate carrier and while same were in possession of garnishee, garnishee was entitled to the exclusive use and possession thereof as a common carrier of interstate freights. For many years it has been the custom of rail carriers to allow the freight charges to follow the shipments, the delivering line collecting the charges for all carriers and accounting to each other carrier for its proportion; likewise it has been the custom for the initial line to sell through passenger tickets, collecting the entire charge and accounting to the connecting lines for their proportions; that a different method could not be pursued with reference to interstate business handled in and out of El Paso by garnishee's railroad and the railroad of Railway Company which connect at the New Mexico-Texas state line, without discriminating against the city of El Paso (population 50,000 or more) and against such traffic. Pending litigation the garnishee is withholding sufficient of the funds due Railway Company to satisfy the purported judgment in favor of Wells. For many years prior to the decision in A. T. & S. F., v. Weeks, 254 Federal 513 (Petition for Certiorari refused by this Court), which held that Railway Company was not subject to suit in Texas, it had

been the practice of attorneys at El Paso to there institute suits against Railway Company for injuries to persons in the states of Illinois, Colorado, New Mexico, Arizona, Missouri and California, when plaintiffs were non-residents of the State of Texas; that there had been filed during the six years preceding the filing of the bill in the Weeks case 75 suits at El Paso for personal injuries occurring in such other states in which many thousands of dollars were involved and in which in order to prevent defaults it was necessary for Railway Company in defending to bring numerous employes from their regular work in such other states to El Paso to testify and during the absence of such employes as witnessess substitutes were employed.

We append as an exhibit extract from the Constitution of Texas and copies of certain of its Statutes.

SUMMARY OF THE LAW

(a). If the Texas Statute, Article 247a, is construed to warrant garnishment under facts here appearing, it interferes with and impedes Interstate Commerce as directed and required under the Interstate Commerce Act and Transportation Act of 1920.

(b). To subject petitioner's property on the cause and under the facts here appearing would be a taking of same without due process of law, and a denial to it of the equal protection of the law.

(c) Any Statute of Texas which undertakes to confer jurisdiction over foreign railroad corporations, or to fix liens on property thereof, under facts as here appear, is violative of the Fourteenth Amendment to the Constitution of the United States.

(d). Article 247a of the Texas Statutes is unenforceable as here applied, in that additional rights and remedies are therein given against non-residents to any that may be asserted against residents of the State, and to apply same to a foreign railroad corporation would violate the Fourteenth Amendment, and would be violative of Section 2, Article IV, of the Constitution, which requires that citizens of each State shall be entitled to all of the privileges and immunities of citizens of the several states.

(e). The process of foreign attachment cannot be constitutionally used to confer jurisdiction, the defendant being solvent and having assets subject to process at the place where the cause of action arose, at the place where the defendant resides, and in other states.

(f). The funds impounded were not, under the facts appearing, subject to garnishment and no lien thereon was fixed under the garnishment writ.

(g). Article 247a of the Texas Statutes does not authorize the issuance of the writ of garnishment.

(h). As petitioner is required under the Interstate Commerce Act to permit its cars and engines to run into Texas, it would not be due process of law to require it to submit to the jurisdiction of the Texas State Courts by proceedings in rem on causes of action by citizens of other States, originating in such other States, and having no relation to any traffic or transportation to or from Texas points, or any business or thing therein.

CONCLUSION.

Your petitioner respectfully submits that this is a case in which this Honorable Court should order the issuance

of the Writ of Certiorari because of the manifest errors therein appearing, and the furtherance of justice requires conclusive decision upon the questions of law involved. Your petitioner therefore

PRAYS

this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to bring this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

Alex. Britton,

J. W. Terry,

A. H. Culwell,
Attorneys for Petitioner.

Gardiner Lathrop.
of Counsel.

EXHIBIT.

Section 6, Article 10 Texas Constitution:

"No railroad company organized under the laws of this State shall consolidate, by private or judicial sale or otherwise, with any railroad company organized under the laws of any other State or of the United States." (P. R. 80).

Article 6406 of Texas Revised Statutes:

"No corporation, except one chartered under the laws of the State of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or operate any railway within this State." (P. R. 80).

"Art. 1874. (1235) (1235). Citation by publication—

"Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the Clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once a week for four consecutive weeks previous to the return day thereof. (Acts March 16, 1848, P. 106, Sec. 13; March 15, 1875, p. 170, Sec. 1. Act 1879, Ch. 96, O. 13, P. D. 25)." (P. R. 79).

"Art. 1941. (1346) (1212, 1345). Procedure in case of service by publication where no answer, etc:

"Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case, a statement of the evidence, approved and

signed by the judge, shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit." (P. R. 71).

"Art. 1861. (1223) Foreign corporation, how served:

"In any suit against a foreign, private or public corporation, joint stock company or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company or association. (Acts of 1885, p. 79)." (P. R. 80).

Article 293, Texas Revised Statutes:

"Art. 293. (239) (205). Judgment against the Garnishee when he is indebted:

"Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs." (P. R. 78).

Act of 1913.

ATTACHMENTS—Amending Chapter 1, Title 11, Revised Civil Statutes. 1911, Relating thereto.

"An Act to amend Chapter One, title Eleven of the Revised Civil Statutes of this State, of 1911, relating to attachments, by adding thereto Art. 247a. providing for the issuance of attachments in suits against persons. co-partnerships. associations or corporations upon whom personal service cannot be obtained within this State, founded in tort and upon unliquidated demands and providing for the fixing of the amount of bond in such cases and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Chapter One of Title Eleven of the Revised Civil Statutes of this State, adopted in the year A. D. 1911, relating to attachments, be and the same is hereby amended by adding thereto Article 247a as follows:

"Art. 247a. Provided that nothing in this Chapter shall prevent the issuance of attachments in suits against persons, co-partnerships. associations, or corporations upon whom peronal service can not be obtained within this State. founded in tort or upon demands which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attachment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases.

Sec. 2. The near approach of the close of this called session of the Legislature and the fact that our laws do not now provide for the issuance of attachments upon unliquidated demands creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage and it is so enacted." (P. R. 7-8)

IN THE

SUPREME COURT

OF THE UNITED STATES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner,*

versus

EDMUND R. WELLS, et als, *Respondents.*

No.....

BRIEF.

The Circuit Court of Appeals was inaccurate in its statement to the effect "in Texas the Railway Company was engaged only in interstate commerce." Admittedly, as a fact, it was not engaged in any character of business in Texas, nor, as a matter of law, was it so engaged. The Circuit Court of Appeals, in the case of The Atchison, Topeka & Santa Fe Railway Company vs. Weeks, 254 Fed. 513, so held and a petition for Certiorari in that case was, by this Court, denied. 249 U. S. 602.

The only question at issue here is whether or not petitioner can be subjected to the jurisdiction of Texas Courts on causes of action arising elsewhere at the instance of non-residents, by the impounding under attachment and garnishment of funds or property belonging to it, and arising from or used in the handling of an interstate transportation business.

It has not been contended by Respondents that unaided by these extraordinary writs jurisdiction over Petitioner can be secured in the Courts of Texas. The effect of the service of extraordinary process, under facts admitted, is thus the question at issue, and this question will be discussed therefore from the many angles at which it seems to be presented.

There is at the beginning involved the contention that to enforce the judgments entered, and here complained of, will be, in view of all the circumstances, contrary both to the Interstate Commerce Act and the Transportation Act of 1920. Forbearance is asked while we quote from these Acts.

The Amended Act to Regulate Commerce, 40 Stat.—L. 101, provides:

> "The term 'car service' as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.
>
> "It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful.
>
> "The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the act or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that

the said rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation and be subject to any or all of the provisions of the Act relating thereto.

"The commission shall, after hearing, on a complaint or upon its own initiative, without complaint, establish reasonable rules, regulations and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for non-observance of such rules."

The Transportation Act of 1920, Sec. 402, 41 Stat.—L. 476, provides:

"(10). The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

"(11). It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

"(12). It shall also be the sole duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among

the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines, it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

"(13). The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation and be subject to any or all of the provisions of this Act relating thereto.

"(14). The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using

it, and the penalties or other sanctions for non-observance of such rules, regulations or practices.

"(15). Whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles during such emergency as in its opinion will best promote the service in the interest of the public, and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearings find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;

and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such times and for such periods as it may determine, and to modify, change suspend or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

"(16). Whenever the Commission is of the opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may upon the same procedure as provided in paragraph (15) make such just and reasonable directions with respect to the handling, routing and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

An analysis of the Act to regulate Commerce as amended (Paragraph 4, Section 1) makes it the duty of common carriers engaged in the transportation of passengers or property to establish through routes with just and reasonable rates and fares, with reasonable rules and regulations with respect to the operation thereof and with equitable divisions of joint rates and fares between the carriers participating in such through routes; such Act (Paragraph 6,

Section 1) makes it the duty of such carriers to establish reasonable practices and regulations for the issuance, form and substance of tickets, receipts and bills of lading, for facilities for transportation, and all other matters relating to or connected with the receiving, transporting and delivery of property on just and reasonable terms; such Act (Paragraph 10, Section 1) provides that car service shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property and the supply of trains of any carrier subject to the Act, and makes it the duty of every carrier (Paragraph 11, Section 1) to furnish adequate car service and to establish and observe reasonable rules, regulations and practices with respect to car service; such Act (Paragraph 14, Section 1) authorizes the Interstate Commerce Commission to establish reasonable rules, regulations and practices with respect to car service by carriers and railroads subject to the Act, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using, and empowers the said Commission when of opinion that shortage of equipment, congestion of traffic or other emergency requires immediate action, to suspend the operation of all rules, regulations or practices established with respect to car service without regard to ownership as between carriers of locomotives, cars and other vehicles; such Act (Section 3) makes it unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic, or to subject any person or locality to any particular description of traffic to any unreasonable prejudice or disadvantage whatsoever; such Act (Paragraph 3, Section 3) makes it the duty of carriers according to their respective powers to afford all reasonable and equal facilities for the

receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith; such Act (Section 7) makes it unlawful for any carrier to do any of the acts therein prohibited for the purpose of preventing the carriage of freight from being continuous from the place of shipment to the place of destination; such Act (Section 15) empowers said Commission to enforce the provisions of such Act herein stated; such Act (Paragraph 11, Section 20) requires the initial carrier to issue a bill of lading for freight received and makes it liable for any loss or damage caused by it or its connecting carrier with respect thereto.

It appears from the facts that for many years, it has been and is now the custom and practice of carriers to allow their freight charges to follow the shipment, so that the delivering line collects the entire freight charge for all carriers over whose line the shipment is moved, the delivering carrier accounting to the other lines for their proportion of freight collected; that it has been and is customary, in order to serve the convenience of the passengers, for the initial line to sell passengers tickets good for transportation over connecting lines and to collect from passengers the entire charge and account to the other lines for their proportion thereof; that there is a very large commerce originating at, destined to and passing through El Paso; that the cars and engines and other railroad equipment belonging to Petitioner and in the possession of Garnishee were so in its possession under a contract between petitioner and Garnishee, under which Garnishee was entitled to the exclusive use and possession thereof while needed on its line of road, and that same would have been needed and used by petitioner in the conduct of its business as an Interstate carrier when returned by Garnishee to it; that the monies impounded under the writ of garnishment are for services, not only rendered

entirely beyond the limits of the State of Texas, but same are needed and would have been used by petitioner in the conduct of its business as a common carrier, and as required by law.

In other words, it definitely appears that the cars, engines and railroad equipment, as well as monies impounded under the writ of garnishment, were each and all instrumentalities necessary for the use of petitioner in the conduct of its business. Can these instrumentalities be interfered with or interrupted by reason of a local Statute? That such has been the effect in this case may not be denied.

For years it has been the custom for interstate carriers to permit the charges to follow the shipments, the delivering line collecting the entire amount and accounting to other lines; likewise it has been the custom to permit the initial line to sell through tickets and account to the other lines. Plainly, under the provision of the Interstate Commerce Act the petitioner cannot except El Paso from this custom without violating the provisions of such Act, for it would subject El Paso to undue prejudice and disadvantage. Plainly, the acts regulating commerce contemplate free interchange of cars and of engines between connecting lines of railroad and the use by one of the cars and engines of the other, it evidently being the view of Congress that such will promote the handling of interstate traffic. It was evidently also the view of Congress that the practice of the charges following the freight and the sale of through tickets should continue, as carriers are required to establish through routes and such practices are reasonably necessary to the operation thereof. Under such circumstances, is it due process of law for a state to provide for the attachment of such equipment or the garnishment of funds so arising, in cases on foreign causes of action in which the

citizens of the particular state are in no way interested? Can the state impose such a penalty on the carrier for complying with the acts and view of Congress? Aside from the question of due process of law, is not such action or attempted action by a state an interference with and an impediment to interstate commerce? The necessary tendency of such attempted action is to deter carriers engaged in interstate commerce from carrying out the policy of Congress with respect to through routes and through traffic and the interchange of engines and cars.

It has often been decided that the right of a State to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, cease as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive powers. We contend that by reason of the amendment to the Interstate Commerce Act, as well as the Transportation Act of 1920, this exclusive power as to the subjects of this litigation has been manifested, and that thereby the same has been removed from the sphere of State action, and that therefore the State has not the power to interfere with or impede the continuity of interstate transportation, and that such has been the effect of the uses to which local Statute has been applied in the instant case cannot be doubted.

We shall not quote, extensively, authorities in support of the proposition above asserted, but refer to Southern Railroad Co. v. Railroad Commission, 236 U. S. 447, holding that local Statute requiring railroads to place grab irons on cars is superseded by the Federal Safety Appliance Act. Erie Railroad v. New York, 233 U. S. 681, holding that the labor law of New York relating to hours of service of telegraph operators void as conflicting with Federal Hours of Service Act. Mo. Pac. Railroad v. Washington, 222 U. S. 370, holding hours of service act ineffective because in

conflict with the Federal Act. McDermott v. Wisconsin, 228 U. S. 132, holding the Wisconsin act relating to labeling syrups void as conflicting with Federal Food & Drug Act. Adams Express Co. v. Croninger, 226 U. S. 506, holding the Carmack Amendment supersedes State regulations on the same subject. Mondou v. Railroad Company, 223 U. S. 55, holding the Federal Employers' Liability Act exclusive Louisville & Nashville R. R. v. Hughes, 231 Federal 739, holding Ohio Act for extension of equipment of locomotive boilers superseded by Federal Act.

So that there being no doubt as to the general rule, let's see the application. In the Interstate Commerce Act, prior to the recent amendment, nothing was undertaken in behalf of the Federal Government relative to cars or car service, except to include them under the general definition of transportation in the first Section, but under the Amendment of 1917, it is provided:

> "The term car service as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation by any carrier, subject to the provisions of this Act."

Just rules and regulations are provided for. Penalties prescribed for violation.

The same subject was treated in the Transportation Act of 1920. Definitions of the Interstate Commerce Act were retained, and car service defined as including the use and return of locomotives, cars and other vehicles, plainly indicating that the return of empty cars is a part of car service over which Congress gave the Interstate Commerce Commission the widest jurisdiction.

It also gave jurisdiction for the use of terminal facilities, etc., and because of the assumption by Congress of the

controls enumerated, State power thereover ceased, and herein lies the distinction as to the rights of petitioner and those considered by this Court in Davis v. C. C. C. & St. L. Railroad Co., 217 U. S. 157, so much relied upon by respondents.

We have undertaken to point out the differences in the state of the law at the time the Davis case was decided (1910) and at the present time. Mr. Justice McKenna necessarily considered the subject, having in mind the Interstate Commerce Act as it then stood. The inference is quite strong, however, as he several times referred in the opinion to Congress and its power in the premises, that it was not the intention to hold that if Congress had assumed control of the entire field of interstate transportation that the Iowa Statute there under discussion would be effective and no contention could have been made in that case by the Railroad Company that the laws of the State interfered with interstate commerce, or that they were directly contrary to the Acts of Congress. It is further said in the opinion that Congress had not intended, by the Interstate Commerce Act, to abrogate the attachment laws of the States, and possibly in the state of the law as it existed at that time, there was no inference that the laws of a State regulating commerce interrupted or violated any provision of a Federal Act. But, this cannot be true now.

A reading of the Interstate Commerce Act, as well as the Transportaiton Act of 1920, must lead to the conclusion that Congress has assumed control of the entire field of interstate commerce, including each and all of the instrumentalities thereof; otherwise, a carrier could not comply with these acts. If, in the face of the requirements thereof, the means of complying therewith may be regulated, impeded or interrupted by the local laws of each State, then the carriers will indeed be in a helpless condition, subjected upon the

one hand to a penalty for their failure to conduct transportation as required by Congress, and to be practically enjoined from so doing by the police regulations of every State.

The highest obligation of the carrier is to the public. This is the keynote of the Acts of Congress, and we are not at all sure but what by reason of these acts the instrumentalities needed in the conduct of that business have not been put away in a kind of a civil sanctuary.

The requirements of the Federal Act are imperative. Service is required. Exchange of equipment is required. The rates prescribed by the Interstate Commerce Commission have for their purpose primarily the gathering of funds sufficient to enable the carriers to perform the service required, and if, by garnishment process in a foreign jurisdiction on a cause of action arising elsewhere, these funds may be diverted under a local Statute, the continuity of service is to that extent always interrupted.

It must be noted that Mr. Justice McKenna in the Davis case was careful to limit the effect of the decision to the facts there appearing, and necessarily to the law as it then existed. There has been great advance in the solution of the various railroad problems that have been troublous during the past few years. The demands of the public for uninterrupted and prompt service; yes, the growing demands therefor was the moving spirit behind the Amendments to the Act of Congress regulating carriers. The twelve years intervening since the pronouncement of Mr. Justice McKenna, as above, have been wrought with changes more rapid and drastic in the control of the transportation of this country than ever before, or that our forefathers ever dreamed would be taken, and as a result of which every activity of an interstate carrier is under control of some law or the regulation of the Interstate Commerce Commission.

It would seem that no phase of the subject has been left untouched, and as Congress stepped in, and by each successive step assumed greater control, the power of the States receded relatively.

There is no longer, insofar as this subject goes, such a thing as dual control. Congress in effect having said to the carriers:

> "The Federal Government will hereafter regulate all of your activities from the moment a pound of freight to be transported interstate is received, until the car containing the same has been returned to its home terminal. Your power to borrow money for the conduct of your business will be controlled. The issuance of your securities shall be regulated. The wages of your employes will be fixed."

Indeed, this control is so complete that even the right to build new or additional lines is regulated. And, having so entirely surrounded the carrier, even to say that a State may by local Statute seize any of these instrumentalities on a cause of action sounding in tort in a State wherein a particular carrier is not doing business, is inconceivable; and a local law which so authorizes would appear to be so plainly violative of the control of the carrier, and its activities, as evidenced by the Acts of Congress, that no argument should be deemed necessary. And, yet, such is not only the theory but the effect of what is sought in the action instituted by Wells.

It would seem to be plain, in view of what Congress has said, that the State is deprived of the right to interfere with the handling or distribution of cars, or to issue any process which would impede regular and orderly interstate transportation or deprive the carrier of funds necessary for that purpose, and not only so, but it is the policy of the

law to keep lines of transportation open and to require continuous transit between the connecting carriers, as well as interchange of cars, in the interest of the general public, and these needs may not be interfered with by the State; and that this has been the uniform tendency for many years, we have only to cite St. L. & S. W. Railroad v. Arkansas, 217 U. S. 136, wherein a State Statute, which undertook to compel a Railroad Company to distribute cars in a particular manner and as per an order issued by the Railroad Commission of the State, was held to impose a burden on interstate commerce, and was unconstitutional under the commerce clause of the Constitution.

It thus appears that the entire field of interstate transportation has been fully occupied by Congress, and that its regulations are, as to the carrier, so complete and conclusive as to exclude from all consideration State control or interference therewith, and because of which any construction of the Texas Statute so as to authorize thereunder the seizure by attachment of cars and engines of Petitioner while in the possession of the Garnishee or as authorizing the seizure by a writ of garnishment monies due or to become due Petitioner by Garnishee for freight and passenger charges for account of Petitioner, same having been collected by Garnishee as the delivering transportation line, will necessarily impede and obstruct this Petitioner in the performance of the duties imposed upon it under the Act to regulate commerce, and not only so, but that same will interfere with and obstruct the Interstate Commerce Commission in the performance of the duties imposed by said Act, and enjoined upon the carrier.

Not only are the acts regulating commerce materially different from what they were when Davis v. C. C. C. & St. L. R. R. Co., 217 U. S. 157 was decided, but it was not made

to appear there, as it does here, that the result of sustaining the garnishment proceedings would be to cause a flood of foreign litigation, hereinafter discussed, to the detriment of the carriers engaged in interstate commerce, and of such commerce; on the contrary, the Davis case was an isolated case, and the Court was careful to confine its decision to the particular case.

And, if the Texas Statute is so construed, Petitioner will be deprived of its properties and rights without due process of law. As for instance, while requiring Petitioner by the Act to regulate commerce, to permit its cars and engines to run into Texas, and to permit Garnishee to collect its freight and passenger charges, which it must do, to then further require Petitioner to submit to the jurisdiction of the State Courts of Texas on causes of action by citizens of other States on causes originating in other States and having no relation whatever to any traffic or transportation to or from El Paso, or to any business or thing, is not due process of law; but, this is the identical result if the Texas Statute under consideration may be enforced in the circumstances as are herein presented.

Again, and having reference to the cars, engines and other equipment in the possession of the Garnishee and covered by its answer, there is the further fact that all of these instrumentalities came to the Garnishee under a contract between it and Petitioner, under the terms of which contract Garnishee was entitled to the use of this equipment in the conduct of its business. Now, may this contract be interfered with, as has been the effect of the garnishment proceedings? We say, No. And in this we are supported by the Supreme Court of Massachusetts. In Koontz v. B. & O. Railroad, 107 N. E. 973, a proceeding similar to this was instituted, prior, however to the Amendment of the

Interstate Commerce Act and the passage of the Transportation Act of 1920. It appeared in that case that the New York, New Haven and Hartford Railroad Company had certain cars in its possession belonging to the B. & O. Railroad which were attached. It was shown that the Trustee received the cars under an arrangement or agreement with the other line, which gave it the right to dispatch them to the place of destination on its own line instead of transferring the freight on its own cars. It was permitted to use the empty cars for carrying freight on its own road, etc. And after referring to the Davis case, the Court said:

> "The cars thus became, for the time being, a part of its equipment and compensation therefor ceased when they passed out of the Trustee's possession and control."

Under this state of fact, the Court said:

> "If the Trustee is chargeable, it must retain actual possession so that the cars can be seized on execution. Brown v. Floersheim Mercantile Co., 206 Mass. 373, 376, 92 N. E. 494. And if this precaution is not taken it would be answerable for their value, but not to exceed the amount of the judgment. R. L. c 189, pp. 57-65. Cornell v. Mahoney, 190 Mass. 295, 296. 76 N. E. 664; Thompson v. King, 173 Mass. 439, 53 N. E. 910. The bailment cannot be said to be violative of any rule of public policy to which common carriers of freight should conform. And upon the further statement in the answer, that the cars were in actual use under the agreement at the time of service, and that to carry on its business as a carrier of property independently of the arrangement would be practically impossible, the trus-

> tee ought not to be subjected to the expense of unloading, and re-distribution of their contents, or to the pecuniary loss from interference with the use of the cars which would be incurred if having been emptied they were collected and retained unused to await the result of the litigation. Van Camp Hardware Co. v. Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296; Cox v. Central Vermont R. R. 187 Mass. 609, 73 N. E. 775. The trustee not being chargeable it becomes unnecessary to determine whether the attachment was invalid because of the plaintiff's failure to comply with the provisions of R. L. c 167 p. 39, relating to the attachment of railroad cars in actual use making regular passages. The order of dismissal is affirmed, and the motion of the trustee to be discharged is granted."

We presume that the arrangement there was similar to the one existing in the case at the bar.

It is a familiar rule that a Statute may be fair on its face, and yet unconstitutional as applied to the particular facts of a given case, (Minnesota v. Barber, 136 U. S. 314), and under the facts of this case, we contend that the Texas Statute, Article 247a is void because the particular facts make the Statute, as applied, wholly unconstitutional. Now, what are these facts?

It is contended that service of the writ of garnishment, and impounding of funds thereunder, gave to the Texas Courts jurisdiction over petitioner, at least to the extent of the fund and rolling stock so impounded. Let us therefore examine the question with particular reference to the office of the writ of garnishment under the Texas Statutes.

It appears, without controversy, that petitioner is a foreign railroad corporation doing no business in Texas,

having no line of road in that State, and that the cause of action against petitioner arose in the State of New Mexico, and that at the time of the accident, the plaintiff was a citizen of the State of Colorado; that petitioner had and has more than sufficient assets in either of said States, as well as in the others through which it operates to more than satisfy any demand that plaintiff could establish against it, there being Courts in each of said jurisdictions wherein redress could be obtained.

That Garnishee, Rio Grande, El Paso & Santa Fe Railroad Company, owns and operates a line of road from El Paso to the boundary between the States of Texas and New Mexico, where it connects with the line of petitioner, the two forming a continuous line from El Paso to various stations on the line of petitioner in the numerous states through which it operates.

That it is usual, and practically necessary, for freight charges on shipments originating on the line of petitioner to follow and be collected at El Paso, where same is the destination of shipment; that in the sale of tickets from El Paso to points on the line of petitioner, charge for the entire transit is collected at point of origin; that the cars and engines and other equipment of petitioner and used on the line of the Garnishee Company was so used under contract between the two carriers, under which Garnishee is entitled to the exclusive use and possession of same, while so in its possession, and that it is necessary that the cars of the petitioner containing shipments destined for El Paso should be run through to destination and that at all times it is required to allow this to be done; that all of the funds impounded under the writ of garnishment herein complained of represent the proportion due by the Garnishee to petitioner, not only on interstate business but solely for business

done by petitioner entirely beyond the limits of the State of Texas; that none of same was earned or accrued to petitioner for anything done or performed within the State of Texas and that such funds are needed by petitioner in the conduct of its business and in order to perform the service enjoined upon it by the laws of Congress, lawful rules of the Interstate Commerce Commission as well as the laws of the various States through which it operates, and that the equipment of petitioner in the hands of Garnishee at the time the writ was served was equipment so likewise needed and to be used by petitioner when the same should and in due course of business be returned to it.

We want, in this connection, to especially emphasize the fact that none of the funds so impounded had situs within the State of Texas, and that all of same accrued to this petitioner in the conduct of an interstate transportation business conducted as required by law, and all beyond the limits of the State of Texas.

The agreed statement of facts fully outlines the status of the relation between the two Companies and the rights of petitioner to the funds in question.

It is contended by the respondent that his proceding was justified by Article 247a of the Texas Statute, and that having complied with that and the succeeding Article, jurisdiction was obtained under the writ of garnishment and over this petitioner to the extent of the funds impounded.

It is the rule of decision in Texas that the right to the process of garnishment will be strictly construed against plaintiff in the writ, and every intendment will be indulged in favor of the Garnishee, Jameson v. Searborough, 56 Tex. 358, and many other cases.

Starting with the premise that prior to the passage of this Statute, there was no right to the issuance of the writ

of garnishment on an unliquidated demand, (Hochstadler v. Sam, 73 Tex. 315. Gro. Co. v. T & P Ry. Co. 95 Tex. 486. Armengol v. Richter, 141 S. W. 1028) we say that the Statute in question does not authorize its issuance. Attachment and garnishment are not one and the same, and without a Statute authorizing, neither process can issue in any cause. By its terms, this Statute only permits the issuance of attachment and nowhere authorizes the process of garnishment. Bear in mind that under the writ of attachment in this proceeding no property was found. Whatever was obtained was under the writ of garnishment; in fact a debt is not capable of manual seizure, and therefore cannot be reached under attachment. C. R. I. & P. Ry. v. Sturm, 174 U. S., 715.

Believing as we do, that the rule is universal that the right to the extraordinary process of garnishment is strictly construed, and nothing will be allowed by way of intendment in favor of the right, the Statute clearly negatives an intent to authorize its issuance.

It will be presumed that the Legislature knew the state of the law in Texas at the time this Act was passed, and that it had been held that the process of garnishment could not issue in aid of an action for damages, and this knowledge being charged to the Legislature and the Act not directly authorizing its issuance on an unliquidated demand, we are warranted in assuming that the act expressed all that the Legislature intended by way of enlargement on the right to extraordinary process, and not only may we confidently so assume, but as a matter of law, there was no enlargement as to the right to the process of garnishment. The fact that under the original garnishment Statute the writ might issue where it was made to appear that attachment, with affidavit and bond therefor, had been made, cannot aid

for the reason that under the original garnishment Statute the cause of action declared upon must be liquidated, and it is only where the demand is liquidated that the writ of garnishment may issue by virtue of a previous affidavit and bond in attachment or garnishment. The Statute in question was and is only an enlargement of the right to the writ of attachment, as same had previously existed, and under the circumstances made there to appear. So that we say the Statute itself negatives the right to the process used in this case to obtain jurisdiction over petitioner.

Again, we assert that under the Statutes authorizing attachment and garnishment, the process issued herein fixed no lien which could be enforced against the property impounded.

A review of Chapters 1 and 2, Title II, Revised Statutes of the State of Texas will, as we believe lead to the conclusion that the service of the writ of attachment or garnishment only creates a lien which can be enforced in some of the methods pointed out in these chapters, AFTER a valid judgment has been obtained against the original defendant.

Under the heading "Attachments" Article 267 provides in effect that the execution of a writ of attachment creates a lien from the date of the levy on such personal property as remains in the hands of the attaching officer and the proceeds of such personal property as may have been sold.

Article 268 provides that should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens.

As to garnishments, Article 293 provides for a judgment against the Garnishee for the amount admitted or found to to be due, unless such amount shall exceed the amount of

plaintiff's judgment against the defendant, in which case it shall be for the amount of the judgment, interest and costs. Please note that this Article presupposes judgment aginst the original defendant.

Article 294 provides that where it appears from Garnishee's answer that Garnishee has effects of the defendant liable to execution, the Court shall render a decree requiring the Garnishee to deliver up to the Sheriff presenting an execution in favor of the plaintiff against the defendant, such effects or so much thereof as may be necessary to satisfy the execution.

In short, it definitely appears from these various provisions that under the Statutes of Texas plaintiff must obtain a valid personal judgment against the original defendant on which the lien may be foreclosed or under which, when an execution issues, property may be sold in some of the methods designated.

As said above, the judgment entered in the garnishment proceeding always pre-supposes a valid judgment against the original defendant. The Supreme Court of Texas has in effect so held. Sun Mutual Insurance Company v. Seeligson, 59 Texas 3, Kelly v. Gibbs, 84 Texas 147. We quote from the Seeligson case:

> "It is true that there can be no valid judgment against a Garnishee unless there be a judgment against the defendant, and for this reason Garnishee is entitled to have an inquiry made as to whether or not, when a Court has assumed to render a judgment against a defendant it had jurisdiction over his person and over the subject matter of the suit, for if it had not, a judgment against the Garnishee would be no protection to him.

"If, however, the Court had jurisdiction of the person of the defendant and of the subject matter of the suit, then the Garnishee cannot be heard to question the conclusiveness of the judgment as between the plaintiff and the defendant, for the judgment against himself in such case will be full protection to him for any payment he may make under it.

"The Garnishee not only has the right to resist a judgment against himself until there is a valid judgment against his creditor or the person for whom he holds property, but he has the right and it is his duty to resist a judgment against himself until the Court has jurisdiction over him; otherwise any payment he might make would be a voluntary payment and the judgment would be no protection to him, for it would not be binding upon him if the Court which rendered it had no jurisdiction over him."

It may be that the Legislature could have provided in case of a non-resident for the rendition of a judgment against him to the extent of the property impounded, this in the nature of a judgment in rem, but, there is no such provision. The Legislature has not so provided, and as the Court may not legislate or exercise the function of a Legislature, neither may they supplement an Act of the Legislature, and because of this we urge that the only legal effect, in any event, that may given to Article 247a supra is to hold that it creates a lien or impounds property to be held in legal custody until such time as plaintiff may secure a valid judgment against the defendant, and such a judgment cannot be obtained in Texas against a corporation that is not doing business in the State. A. T. & S. F. Ry. Co. v. Weeks, 254 Fed. 513.

And it occurs to us that unless this construction is placed upon the Article 247a, it is directly in the face of Pennoyer v. Neff., 95 U. S. 714. It may not be amiss in this connection to quote from that case at page 728:

> "But the answer to this position has already been given in the statement that the jurisdiction of the Court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect can not be made to depend upon the facts to be ascertained after it has tried the case and rendered judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment if void when rendered will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

We may, in this connection, refer to Hochstadler v. Sam, 73 Tex. 315, in which it is held that where jurisdiction is sought by virtue of an attachment, if the attachment fails, there is no jurisdiction.

We must be mindful that, as a general proposition, petitioner is not subject to the jurisdiction of the Courts in Texas, and therefore, that no personal judgment can be entered against it in that State, without a voluntary submission to jurisdiction.

The Article 247a of the Statutes of that State must be construed in connection with the other Articles of Chapter 1, Title II, Revised Statutes. And the only Constitutional effect that can be given to this Article 247a is to construe the same as giving a lien upon tangible property located within the State, and to make the proceedings one in rem only, and when this construction is so placed there is the want of authority to foreclose the lien so fixed until there has been rendered a valid judgment against the original defendant.

Of course, the service by publication sought to be obtained against this petitioner would not support a judgment and as the judgment rendered against this petitioner on such service was void, it certainly was not vitalized, nor the judgment entered more effective by reason of a subsequent judgment against the Garnishee. The vitality of the judgment against the original defendant must be determined as of the time when it was entered and cannot become more effective by reason of a subsequent proceeding against a Garnishee. Again we quote from Pennoyer v. Neff. At page 727, it is stated:

> "In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligations upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

So that as there is no Statute in Texas authorizing as against a non-resident judgment against him to the extent of property impounded and as the Courts may not import into a Statute any additions thereto, the conclusion would seem to be forced that in the present proceeding there could be no valid judgment rendered against the Garnishee until a proper judgment had been entered against the original defendant.

It has been held that the original defendant is not required to take notice of a garnishment proceeding and is not concluded by the judgment entered therein. Mo. Pac. Ry. Co. v. Whipsker, 77 Texas 16.

Not only so, but every intendment should be indulged in favor of the absent defendant and Statutes which seek to subject him to the jurisdiction of a foreign Court are never liberally construed. As indicating the modern trend, we

quote from Missouri Pacific Ry. Co. v. Clarendon Boat Oar Co. 42 Sup. Court Rep. 211. wherein Chief Justice Taft used this language:

> "Provisions for making foreign corporations subject to service in the State is a matter of Legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. Indeed, so clear is this that in dealing with Statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State."

And, as such then is what is therein designated the "leaning" of the court as to foreign corporations doing business in a State. how much stronger would be this leaning as applied to foreign corporations who have been adjudged not be responsive to litigation within the State?

It is admitted that the cause of action arose in the State of New Mexico, at which time Wells was a resident of the State of Colorado; that his claim was an unliquidated demand; that there are in the States of Colorado and New Mexico Courts wherein he might assert any cause of action he may have against petitioner, and that petitioner is financially able to respond to any judgment which he might recover against it; that it has in the States of New Mexico and Colorado, as well as other states through which it

operates. property subject to execution of value many thousand times greater than any liability which might be found to exist against it on any cause to be so asserted. (Printed record, 69-70).

That in said cause so to be asserted, the witness in behalf of the Railroad Company, material to its defense, are employees, whose attendance would be necessary and during which attendance they would be required to absent themselves from their usual and customary labors and the Railroad Company would be deprived of their services from such ordinary and customary labors during the time of their attendance upon the Court, for which attendance the Railroad Company would be required to pay their expenses and compensation for loss of time; that said witnesses reside in San Marcial, New Mexico, about one hundred and fifty (150) miles from El Paso. (Printed record 74).

That petitioner operates lines of railroad through many Counties in New Mexico, including the County of Socorro, where plaintiff claims to have been injured, and in which County it has agents upon whom process could be served, as well as Courts having jurisdiction of his cause of action. (Printed record 75).

That for many years prior to the entry of the final decree in the case of petitioner against J. F. Weeks, et al Numbered 109 In Equity on the docket of the District Court of the United States, Western District of Texas, it had been the practice of the attorneys residing in El Paso to institute suit against petitioner in the Courts of El Paso County, Texas for injuries occurring to persons in the States of Illinois, Kansas, Colorado, New Mexico, Arizona, Missouri and California, and wherein the plaintiffs respectively were non-residents of the State of Texas; that

there had been filed prior to the time plaintiff exhibited its bill in the Weeks case, and during the six years immediately preceding the filing of said bill, more than seventy-five suits in the State Courts of El Paso County, Texas for personal injuries occurring as above alleged, and in which many thousands of dollars were involved, and in which cases in order to prevent default it was necessary for petitioner to defend in said causes, and it so defended said cases by bringing numerous employees from their regular work in such other States to El Paso to testify, and during the absence of said employee witnesses from their regular work, substitutes were employed at expense to perform the services of said employees; that since the entry of the final decree in the above entitled Weeks case, no such suits have been filed in the State Courts of El Paso County, Texas against petitioner until the institution of the suit herein complained of; that had the suit of Edmund R. Wells against petitioner been instituted in any State through which petitioner operates or does business, it would have filed answer therein denying liability and would have defended to the extent of its ability against any relief sought. (Printed record 81-82).

And under this state of facts, we assert that this is not a bona fide cause in which plaintiff undertook to subject the property of petitioner to the payment of the asserted claim so made in a foreign jurisdiction, but rather that same is an effort to compel this petitioner to come into Texas to defend a personal suit. We quote again from Pennoyer v. Neff, 95 U. S., beginning on page 723:

> "So the State through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sover-

eignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate."

It is not pretended that this is an effort to subject the property of the Railroad Company to satisfy *any claim of a citizen of Texas against it*. Wells was not such a citizen, but it appears to us to be a rather bold-faced effort to import litigation into Texas, and to force the Railroad Company to appear in that State to defend an action against it which is really in personae. Again we quote from Pennoyer v. Neff, wherein the Court cites the following from Boswell's Lessee v. Otis, 9 Howard 336, as follows:

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

The Court in Pennoyer v. Neff at page 734 also used this language:

> "It is true, that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."

It is submitted that under the record herein, as well as the history of the many cases formerly imported into Texas, this cannot be and is not subtantially a proceeding in rem; and that there was no direct purpose to reach and dispose of any property owned by petitioner in Texas. But as before said, that such procedure was adopted merely and only for the avowed purpose of securing a really unfair advantage. It seems perfectly plain that both Wells and his attorneys knew that it was not necessary to either attach or garnishee any property of petitioner in order to save to them an alleged debt. We again quote from Pennoyer v. Neff, pages 730 and 731:

> "As was stated in a subsequent case, the doctrine of this court is, that the act 'was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its results, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another.' The Lafayette Insurance Company v. French et al, 18 How. 404.

"In all the cases brought in the State and Federal courts where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interest in property within the State to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

The real and only just purpose and object to be obtained under the writ of foreign attachment is to secure a claim that can be secured in no other way. A reading of the entire opinion in Pennoyer v. Neff as well as other cases, would seem to be convincing that such is the real office of the writ and the use thereof never justified where the

defendant has assets at the place of residence of either himself or the claimant more than sufficient to satisfy any judgment that may be asserted, and we here and now attack the good faith of any proceeding wherein it appears that at the place where the accident arose, as well as at the place where the claimant resides, the defendant had assets of far greater value than any amount to be claimed, which could be reached in an orderly way under process regularly issued, and yet, such claimant declines to proceed as by law authorized in such cases, but hies himself to a foreign jurisdiction where neither he nor defendant has a domicile, and undertakes to tie up, by extraordinary writ, property of the defendant, which is being used in an orderly way and in the conduct of a business that is essential not only to the well being and happiness, but to the real necessity of the public at large, and to permit such claimant, in these circumstances, to so clog the wheels of commerce and interfere with the orderly process of interstate transportation and tie up its instrumentalities is under the circumstances wholly indefensible. And, to construe a State Statute as authorizing such a procedure would and will be to a railroad company, whose property is thus impounded, lacking in due process of law, and a denial to it of the equal protection of the laws.

It's worse than folly to contend, under the admitted facts, that it was the intention of the plaintiff in the original action to institute a proceeding in rem. This must address itself to the judicial mind, and unless the real object of that proceeding was one in rem the entire effort should fail. Under such circumstances, every doubt should be resolved against the regularity and good faith of the proceeding. In this connection we can do no better than quote what was said by the Circuit Court of Appeals in A. T. & S. F. v. Weeks. We quote the closing paragraph:

"When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to the railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states. Considerations of this character are manifestly more for the legislative than the judicial department, but they cannot be entirely ignored when the weights of two opinions are so nearly equal."

If the position taken there was sound, the situation presented by this bill would make its application more ob-

vious than then appeared. The property of a Railroad Company has a fixed situs and may be readily reached. And, again we say that the real object of the suit instituted by Wells, as seems to be plainly indicated from the statement of facts, is and was to force this Railroad Company to litigate personal actions in Texas, and that the assumed proceeding in rem was not only more fanciful than real, but there was no excuse for its attempted exercise.

It appears, under the Texas Statute, Article 247a, that the writ therein authorized is only permitted where the cause of action is against a non-resident. That is to say the article provides for the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service cannot be obtained in this state founded in tort, or upon demands which are unliquidated, and as petitioner falls within the class of those upon which personal service cannot be obtained within the State of Texas, it is charged that this Article justifies the proceeding taken.

It is to be noted that the classification made is against non-residents; in other words, if service can be had on the given defendant within the State of Texas, there is, under this Statute, no right to the writ of attachment on unliquidated demands, and no right is, therefore by the Article, created except as against the non-resident. If the non-resident has an unliquidated demand against a citizen of Texas, he is denied the right to the writ of attachment. If one citizen of Texas has an unliquidated demand against another citizen of Texas, he may not sue out an attachment, but if demand is against one who does not reside within that State, such fact is enough in and of itself to allow the issuance of the writ. We contend that the Statute is for this reason inhibited under Section Two, Article Four of

the Constitution of the United States, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several states; that the Statute in question does deny to the non-resident a privilege and an immunity granted to citizens of Texas cannot, as we assume, be denied.

A simple example will suffice: If a non-resident has an unliquidated demand against a citizen of Texas he may not invoke this Statute; vice versa: if a citizen of Texas has such demand against a non-resident he may invoke the aid of the extraordinary process provided under the Statute. Plainly, this gives to the citizen of Texas a right denied to the citizen of another State.

As we understand the construction which has been placed upon this Section of the Constitution, its provisions are so broad as to include in one class every citizen of every State in the Union, and to neither or none shall a privilege be granted that is denied to any of the others. The Section has been construed many times, and as far back as Paul v Virginia, 8 Wallace 168, the broad construction above contended for was placed upon the Section. In Cole v. Cunningham, 133 U. S. 107, the Court said:

> "The intention of Section 2, Article 4, was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

The Texas Statute does not include the right to institute actions in favor of a non-resident.

In Chambers v. B. & O. Railroad, 207 U. S. 142, the Court in passing upon a Statute of Ohio that gave a remedy for death of a citizen of that State, among other things, said:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. Corfield v. Coryell, 4 Wash. C. C. 371, 380 Fed. Cas. No. 3,230, per Washington J; Ward v. Maryland 12 Wall. 418, 430, 20 L. Ed. 449, 452, per Clifford, J.; Cole v. Cunningham, 133 U. S. 107, 114, 33 L. Ed. 538, 542, 10 Supt. Ct. Rep. 269, per Fuller Ch. J.; Blake v. McClung 172 U. S. 239, 252, 43 L. Ed. 432, 437, 19 Sup. Ct. Rep. 165, per Harlan, J.
>
> "But subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states.

> The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from citizens of other states is void, because in conflict with the supreme law of the land."

The Circuit Court of Appeals for the Eighth Circuit in the recent case of Eggen v. Canadian Northern Railway 255 Fed. 937 held in passing upon a Statute of Minnesota, which provided that when a cause of action has arisen outside the State and an action thereon under the laws of the place it arose is barred by lapse of time, no such action shall be maintained in the State, unless plaintiff be a citizen of the State who has owned the cause of action since accrual, violates this provision of the Constitution, that the provision aims at unified nationality as opposed to confederation.

It would seem to be apparent that the object of this Statute was to confer jurisdiction in Texas Courts on causes of action for damages against foreign corporations not doing business in the State. We may as well face the situation candidly and call things by their right name, in so doing. The object of this Statute was to benefit the damage suit lawyer in Texas who had secured a claim against a railroad not operating in that State. The Statute might properly have been labeled: "A clean bill of health to the damage suit industry," inviting it to import its litigation arising elsewhere into Texas, and as against which we again invoke the closing remarks of the Circuit Court of Appeals in the Weeks case, supra.

While there may be some who deny, yet we are among others who are unwilling to admit that our Constitution is meaningless or that it fails to be an ark of safety, guaran-

teeing a security that may not be abridged even in the interest of the self-sacrificing damage-suit industry, and if the particular section of that time-honored confession of faith may be invoked in behalf of a foreign corporation whose rights have been unquestionably invaded, then, that this Article of the Texas Statutes flies in the face of it will not admit of doubt.

It occurs to us that the circumstances, as made to appear in this case, justify the Court in extending every doubt in favor of petitioner. And, we think the question may well be asked: Why the extreme effort to bring actions of this kind in El Paso County, Texas? Are there not many Courts of competent jurisdiction within each of the States that have admitted jurisdiction over the Santa Fe Railroad Company, wherein causes of action against it may be heard? Is it not entirely solvent and able to respond to any demand that a litigant shall reduce to judgment within any of those jurisdictions? Did this cause of action arise within the State of Texas? Was not the service in which plaintiff was unfortunately injured performed in some other jurisdiction than Texas? Why, then, we again ask, assuming that the answers to each of these questions may be readily given, is there the untiring effort to import this litigation into Texas?

We candidly believe that the Court is justified in searching these questions, and that such search is entirely legitimate in order to properly determine the various propositions that have been herein presented. Believing that thereby the Court will be enabled to apply the law regulating interstate transportation companies and the applicable provisions of the Constitution of the United States, and thus render a decree that will give to the petitioner the protection it deserves, and at the same time will be just and fair to both

parties, holding, as you must that Wells has no inherent right to institute suit in Texas, and that it is only by reason of what we are pleased to call "a fiction" which gives him any character of standing in the Courts of Texas and because of which we contend that petitioner is undoubtedly entitled to that "leaning" referred to by Chief Justice Taft in the Clarendon Boat Oar case. It is the duty of the Court in construing a Statute not only to consider the plain import of the words used, but likewise the effect of the construction placed, having in mind the object sought. If the action here under consideration can be maintained, then a suit similar could be brought in Texas against the Boston & Maine Railroad at any place within the State where a traffic balance in favor of the Boston & Maine may be found. In other words, practically expressed: A suit for personal injuries could be filed in Texas against any railroad in the United States by the simple method of running a garnishment on a Texas line and tieing up the traffic balance of the defendant railroad, and surely it will not be contended that such a construction would accord with the requirements of the Interstate Commerce Act or the Transportation Act of 1920, or the protective provisions of the Constitution of the United States.

We want again to emphasize the point that the process of foreign attachment cannot be constitutionally considered as applicable to a solvent defendant, whose situs is permanently fixed, and when used in these circumstances, a legal fraud is committed, resulting in deprivation of rights to a defendant which he should be able to confidently repel at all times, and that is precisely the situation presented here. We cannot be made to believe that a solvent, going concern that has a fixed place of abode known of all men, with property subject to execution at given places and like

wise known of all men, may be yanked at the will or caprice of a claimant into a jurisdiction where neither of them has a residence by the use of the process of garnishment or attachment. Such writs are never allowable when ordinary process will suffice. Otherwise, the provisions of our Constitution become as to a defendant situated as here presented, a sounding bell and tinkling cymbal. mere beautiful words only are its provisions having in reality however nothing of substance that may be used by the injured.

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No. 877232

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IN THE

SUPREME COURT

OF THE UNITED STATES

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OCTOBER TERM, 1922

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Petitioner,*

vs.

EDMUND R. WELLS, et al

No._____

ANSWER TO PETITION FOR CERTIORARI

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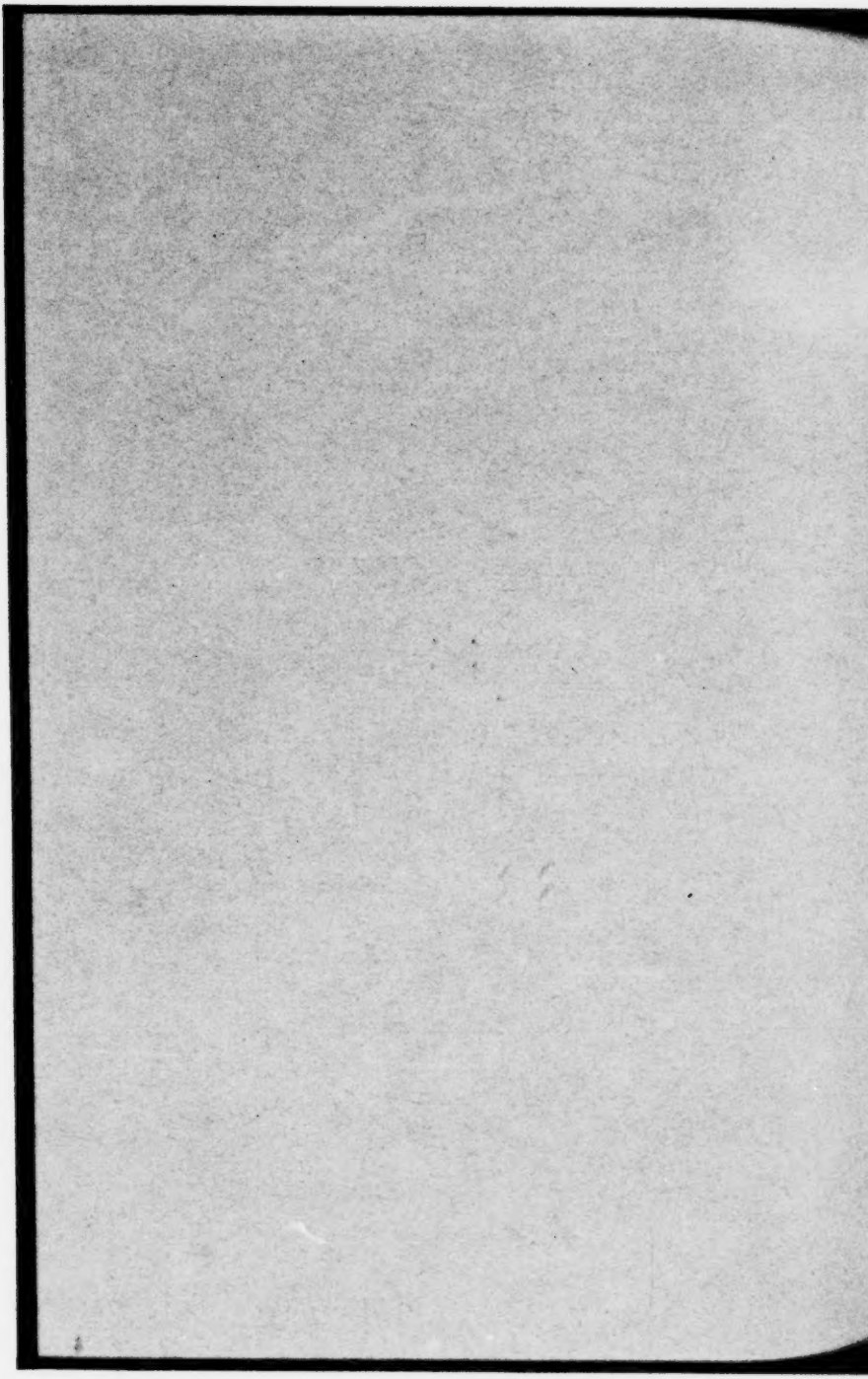

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In addition to the reasons given in the opinion of the Circuit Court of Appeals we urge the following:

No property was impounded or condemned. The only judgment was one for money against the garnishee on the ground that it was indebted to the original defendant.

1. Even if the State Court erred in rendering judgment against the garnishee such error was one of law alone; and the court having jurisdiction over the person of the garnishee, a resident of Texas and personally served in that state with process, the only relief from such error

was by appeal or writ of error. The judgment cannot be set aside or held void in this collateral proceeding.

Marin v. Augedahl 247 U. S. 142 (62:1038).
Waples Painter Co. vs. Ross, 107 Tex. 215 176 SW 47.
Freeman on Void Jud. Sales, Sec. 20.
Menard v. MacDonald, 115 S. W. 63.
Odle v. Frost, 59 Tex. 684.
Bank of Cumberland v. Simpson (Ky), 77 S. W. 695.
Goodman v. Henley, 80 Tex. 499.
Farmer v. Saunders, 128 S. W. 941.
Wagley v. Wagley, 230 S. W. 493.
Black on Jud., Sec. 329.

2. The suit of Wells against the Atchison, Topeka & Santa Fe Ry. Co. was so far a separate suit from the garnishment sued out against the garnishee, under our garnishment statutes as construed by the Supreme Court of Texas, that the judgment for Wells against the garnishee does not prevent the petitioner from suing and recovering against the garnishee for the same debt, and thus subjecting the garnishee to a double recovery, where the garnishee fails as it did in this case, to either make the original defendant party to the garnishment or appeal from the judgment against the garnishee.

Ry. v. Whipsker 77 Tex. 14, 13 SW 639;
Waples Painter Co. v. Ross 107 Tex. 215, 176 SW 47;
Sun Etc. Co. v. Seeligson 59 Tex. 3.

Therefore, the original defendant (the petitioner herein) has no interest in enjoining the judgment against the garnishee, not being prejudiced thereby; nor can it enjoin the judment rendered against it because such judgment

does not purport to bind it personally, but only so far as might be satisfied out of the judgment against the garnishee.

3. If the judgment against the garnishee is only erroneous in matter of law, it is not void and can't be enjoined in this collateral proceeding. If such judgment is void then it is no obstacle in the way of the petitioner recovering of the garnishee any demand it may otherwise have.

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